Filed 4/18/23 In re B.F. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re B.F., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. J.F., Defendant and Appellant.	E079928 (Super. Ct. No. INJ014318) OPINION

APPEAL from the Superior Court of Riverside County. Mona Nemat, Judge. Conditionally affirmed and remanded with directions.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Minh C. Tran, County Counsel, Teresa K.B. Beecham and Julie K. Jarvi, Deputy County Counsels, for Plaintiff and Respondent.

I.

INTRODUCTION

J.F. (Father) appeals from the juvenile court's legal guardianship order as to his 12-year-old daughter B.F.[1] His sole contention on appeal is that the Riverside County Department of Public Social Services (DPSS) failed to discharge its duty of initial inquiry under state law implementing the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.), and therefore substantial evidence did not support the juvenile court's finding that ICWA did not apply. We agree that the ICWA inquiry was inadequate. Accordingly, we conditionally affirm the order and remand for the limited purpose of ICWA compliance.

II.

FACTUAL AND PROCEDURAL BACKGROUND

On April 13, 2020, DPSS filed a petition on behalf of B.F. and her sisters R.N. and E.M. pursuant to Welfare and Institutions Code[2] section 300, subdivisions (b) (failure to protect) and (d) (sexual abuse) based, in part, on Mother's extensive history with DPSS and of abusing controlled substances, Mother's boyfriend having placed a hidden camera in the family bathroom, Mother's knowledge her boyfriend had a sexual addiction and had allowed him to supervise the girls, Father's mental health issues, and Father's history

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[1] A.M. (Mother) is not a party to this appeal.

[2] All future statutory references are to the Welfare and Institutions Code unless otherwise stated.

of abusing controlled substances and with DPSS. The girls had different fathers, and at the time, R.N. was 15 years old, B.F. was nine years old, and E.M. was five years old.[3]

According to the ICWA-010(A) inquiry form attached to the petition, neither parent gave reason to believe B.F. is or may be an Indian child. On February 27, 2020, Mother denied having any Native American ancestry. On April 9, 2020, Father denied having any Native American ancestry. Father was homeless at the time. He resided in his car and was not working. Father reported that he had a history of abusing controlled substances and claimed that he had been sober since 2010. He also stated that he had been diagnosed with schizophrenia about one or two years earlier.

The girls were taken into protective custody on April 10, 2020. Mother reported that there were no family members to consider for placement other than E.M.'s father. R.N. and B.F. were placed into foster care, while E.M. remained in her father's custody.

The detention hearing was held on April 14, 2020, which was conducted telephonically due to the pandemic. Mother's counsel informed the juvenile court that Mother had no Native Indian heritage and that Mother had filled out an ICWA-020 form that was ready to email to the court. The court asked that Mother's counsel bring the form at the next court hearing. Father's counsel also informed the court that Father had no Native American heritage. The juvenile court directed the parents to submit an ICWA-020 form for the next hearing date, and found that, "based on the information currently known," ICWA did not apply. The court also found that DPSS had conducted a

[3] B.F.'s sisters are not subjects of this appeal.

sufficient inquiry regarding whether the child may have Indian ancestry and that ICWA did not apply. The court formally detained B.F. from parental custody.

On April 23, 2020, Mother denied having any Native American ancestry. Father made himself unavailable to the social worker, as such the social worker was unable to inquiry of Father as to his Native American heritage. Mother reported that her parents were deceased. She claimed the maternal grandmother committed suicide when she was 31 years old and she (Mother) was 15 years old. Mother had two sisters and one brother and a relationship with her brother. She spoke with her brother on the telephone at least once a month. Mother claimed that she had no local family members, but also reported that the family members that were local were not good role models for her children.

At a hearing on June 16, 2020, a maternal aunt appeared at the hearing and indicated that she was interested in placement of the children in her care.

Due to her "uncontainable behaviors," on July 20, 2020, B.F. was placed into a new foster home.

At the contested jurisdictional/dispositional hearing on August 19, 2020, the juvenile court found that ICWA did not apply. The court also found that a sufficient inquiry had been conducted regarding whether the child may have Native American ancestry, and that B.F. was not an Indian child. The court found true the allegations in the second amended petition and declared B.F. a dependent of the court. Father was denied reunification services. The parents were ordered to disclose to DPSS the names, residency, and any known identifying information of any maternal and paternal relatives.

The court further determined that DPSS had made "diligent efforts to identify, locate, and contact the child's. . . relatives, except those determined to be inappropriate to contact due to their involvement with the family or domestic violence."

A second cousin was contacted about relative placement, but she stated that she did not wish to have placement of B.F. and R.N. An older half-sister of R.N.'s was also contacted about placement, but R.N. did not want to be placed with her.

On September 23, 2020, May 28, 2021, December 22, 2021, and June 15, 2022, Mother denied having any Native American ancestry or tribal affiliation. On October 5, 2020, May 19, 2021, December 22, 2021, and June 20, 2022, Father denied having any Native American ancestry or tribal affiliations.

B.F. was content with her current placement and wanted to remain with her caregivers as her "'forever home.'" She was thriving in her placement as indicated by her improvement in behaviors and demeanor. She, however, desired to continue to have visitation with her mother and Father. She visited with Father once a month and looked forward to seeing him. Mother and Father did not provide any relatives for placement of B.F. several times when asked by the social worker. B.F.'s caregiver was willing to provide permanency in the form of legal guardianship.

On March 10, 2022, the juvenile court found that ICWA did not apply to B.F.

DPSS recommended that the juvenile court establish legal guardianship with B.F.'s caregivers. B.F. stated that, if she could not reunify with her mother, then she was

in agreement with the legal guardianship. B.F. felt safe and comfortable in her caregivers' home. B.F. stated that her caregivers met all of her needs.

On September 20, 2022, the juvenile court ordered B.F.'s permanent plan to be legal guardianship and terminated the dependency. The parents were ordered to have visitation a minimum of twice a month for two hours each as directed by the legal guardians. Father timely appealed.

III.

DISCUSSION

Father contends DPSS failed to comply with its duty of inquiry with respect to ICWA. He thus argues there is insufficient evidence to support the juvenile court's finding that ICWA did not apply.

ICWA establishes minimum federal standards that a state court must follow before removing Indian children from their families. (*In re T.G.* (2020) 58 Cal.App.5th 275, 287.) California law implementing ICWA also imposes requirements to protect the rights of Indian children, their families, and their tribes. (See §§ 224-224.6; *In re Abbigail A.* (2016) 1 Cal.5th 83, 91 ["persistent noncompliance with ICWA led the Legislature in 2006 to 'incorporate[] ICWA's requirements into California statutory law'"].)

"""'Federal regulations implementing ICWA . . . require that state courts "ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child." [Citation.] The court must also "instruct the parties to inform the court if they

subsequently receive information that provides reason to know the child is an Indian child."""" [Citations.] 'State law, however, more broadly imposes on social services agencies and juvenile courts (but not parents) an "affirmative and continuing duty to inquire" whether a child in the dependency proceeding "is or may be an Indian child."'" (*In re J.C.* (2022) 77 Cal.App.5th 70, 77.)

Under California law, the juvenile court and county child welfare department have "an affirmative and continuing duty to inquire" whether a child subject to a section 300 petition may be an Indian child. (§ 224.2, subd. (a); see *In re D.F.* (2020) 55 Cal.App.5th 558, 566.) "This continuing duty can be divided into three phases: the initial duty to inquire, the duty of further inquiry, and the duty to provide formal ICWA notice." (*In re D.F.*, *supra*, at p. 566.) The juvenile court must inquire at each party's first appearance, whether any participant in the proceeding "knows or has reason to know that the child is an Indian child." (§ 224.2, subd. (c).) Part of the initial inquiry also includes requiring each party to complete California Judicial Council form ICWA-020, Parental Notification of Indian Status. (Cal. Rules of Court, rule 5.481(a)(2)(C).)

When the initial inquiry gives the juvenile court or social worker "reason to believe that an Indian child is involved," (§ 224.2, subd. (e)) the court and social worker must conduct further inquiry to "determine whether there is reason to know a child is an Indian child." (§ 224.2, subd. (e)(2); see *In re J.S.* (2021) 62 Cal.App.5th 678, 686.) The department "does not discharge their duty of further inquiry until they make a 'meaningful effort' to locate and interview extended family members and to contact BIA

and the tribes.'" (*In re K.T.* (2022) 76 Cal.App.5th 732, 744.) Extended family members include adults who are the child's stepparents, grandparents, siblings, brothers-or sisters-in-law, aunts, uncles, nieces, nephews, and first or second cousins. (25 U.S.C. § 1903(2); § 224.1, subd. (c).) Finally, if the further inquiry """"results in a reason to *know* the child is an Indian child, then the formal notice requirements of section 224.3 apply."""" (*In re J.C.*, *supra*, 77 Cal.App.5th at p. 78) Federal regulations define the grounds for reason to know that an Indian child is involved (25 C.F.R. § 23.107(c)(1)-(6)), and state law conforms to that definition (§ 224.2, subd. (d)(1)-(6)).

""""If the court makes a finding that proper and adequate further inquiry and due diligence as required in [section 224.2] have been conducted and there is no reason to know whether the child is an Indian child, the court may make a finding that [ICWA] does not apply to the proceedings, subject to reversal based on sufficiency of the evidence."""" (*In re J.C.*, *supra*, 77 Cal.App.5th at p. 78.) A juvenile court finding that ICWA is inapplicable generally implies that the Department and court have fulfilled their duty to inquire. (See *In re Austin J.* (2020) 47 Cal.App.5th 870, 885 [a finding that "ICWA does not apply" implies social workers and court "did not know or have a reason to know the children were Indian children and that social workers had fulfilled their duty of inquiry"].) We review ICWA findings for substantial evidence, but "where the facts are undisputed, we independently determine whether ICWA's requirements have been satisfied." (*In re D.S.* (2020) 46 Cal.App.5th 1041, 1051.)

Father contends that the Department did not conduct an adequate inquiry into the child's possible Indian ancestry. Specifically, he asserts that the Department's inquiry was insufficient because it did not interview any member of his or Mother's extended and available family about possible Indian ancestry. We agree.

Here, the record does not show that the parents had filed an ICWA-020 form, even though Mother's counsel had indicated the form had been filled out by Mother, and the juvenile court had requested the parties file the form at the next court hearing. In addition, the record does not indicate the court personally inquired of the parents of their possible Indian ancestry at their first in-person or telephonic court appearance. Furthermore, DPSS did not ask any maternal family members whether they had reason to know if B.F. might have Indian ancestry. There is no indication DPSS inquired of Mother's sisters and brother with whom she communicated regularly. There is no indication DPSS asked her for their contact information, or that DPSS contacted them. In addition, even though DPSS had knowledge concerning a second maternal cousin and R.N.'s older sibling who had both been contacted concerning placement, there is no indication in the record to show that DPSS inquired of them about B.F.'s possible Indian ancestry or if there were any other extended family members who might have that information. There is also no indication in the record to demonstrate DPSS inquired of Father concerning his relatives. Simply put, and notwithstanding the Department's suggestion, this is not a case where it had to "cast about" to locate a parent's extended relatives. Because grandmothers and uncles qualify as "extended family members" under

ICWA, the Department should have conducted ICWA inquiries of them. (See 25 U.S.C. § 1903(2); § 224.1, subd. (c).)

In part, DPSS argues any inquiry error was harmless because Mother and Father repeatedly denied they had any Indian ancestry, and there was no information in the record suggesting that B.F. might be an Indian child as defined by the ICWA.

Multiple appellate decisions have considered how to assess whether error in carrying out ICWA inquiry is prejudicial, and the issue is currently pending before our Supreme Court. (*In re Dezi C.* (2022) 79 Cal.App.5th 769, review granted Sept. 21, 2022, S275578.) As explained in *In re K.H.* (2022) 84 Cal.App.5th 566, 611-618 (*K.H.*), the appellate courts have articulated several different tests for prejudice. Some courts have required the parent to show that, if asked, he or she would have claimed Indian ancestry. (See, e.g., *In re A.C.* (2021) 65 Cal.App.5th 1060, 1069.) Other courts follow a "'clear rule that requires reversal in all cases where the ICWA inquiry rules were not followed.'" (*In re G.H.* (2022) 84 Cal.App.5th 15, 32, quoting *In re E.V.* (2022) 80 Cal.App.5th 691, 694.)

The *K.H.* court examined at the issue slightly differently. It explained that the relevant rights under ICWA belong to Indian tribes, which have a statutory right to receive notice when an Indian child may be involved so they can determine whether the child is an Indian child, and "prejudice to those rights lies in the failure to gather and record the very information the juvenile court needs to ensure accuracy in determining whether further inquiry or notice is required." (*K.H.*, *supra*, 84 Cal.App.5th at p. 591.)

The question for the reviewing court is whether the lower court's discretionary determination of whether the department conducted an adequate and diligent ICWA inquiry is supported by substantial evidence, or whether the department's efforts "fall so short of the mark that the evidence is patently insufficient to support the court's determination, and [the court] abuses its discretion in finding the agency's inquiry was proper, adequate, and discharged with due diligence." (*Id*. at p. 604.) Considering the appropriate standard for reversal, the *K.H.* court concluded that "where the opportunity to gather the relevant information critical to determining whether the child is or may be an Indian child is lost because there has not been adequate inquiry and due diligence, reversal for correction is generally the only effective safeguard." (*Id*. at p. 610.)

We conclude the error here requires us to remand the matter. The ICWA inquiry regarding Father and Mother and their family was patently insufficient. DPSS and the juvenile court never asked Father and/or Mother their family's possible Indian ancestry at any court proceeding. (See *In re Antonio R.* (2022) 76 Cal.App.5th 421, 431-432 [section 224.2, subdivision (b), required the child protective agency to interview extended family members].) And, the parents never filed an ICWA-020 form, albeit the court requested the parties do so. And there is no indication in the record that either parent spoke to their respective counsel about ICWA before the form was filed, or that Father had a copy of the form when the court made its finding.

Nor did the court ask DPSS to describe the efforts it made to ascertain B.F.'s possible Indian ancestry. The record reflects that, other than asking Father and Mother

about possible Indian ancestry, DPSS made no such efforts at all. That was error. (See *In re N.G.* (2018) 27 Cal.App.5th 474, 482 [juvenile court had a duty to ensure the child protective agency made the relevant inquiries, including asking the maternal uncle whether the child "may have maternal Indian ancestry"]; see also In re K.R. (2018) 20 Cal.App.5th 701, 709 ["the court has a responsibility to ascertain the agency has conducted an adequate investigation and cannot simply sign off on the notices as legally adequate without doing so"].)

In summary, on this record, we cannot say that DPSS and the court's failure to comply with their inquiry obligations was harmless. The record contains no indication that DPSS asked any of Father of Mother's extended and known relatives about their possible Indian ancestry at any point in time. Furthermore, the court never inquired of Father or Mother of their possible Indian ancestry and neither parent filed an ICWA-020 form. In addition, maternal, and possibly paternal, family members were readily available, and their responses would likely have borne meaningfully with respect to whether B.F. is an Indian child, regardless of the outcome of the inquiry. Moreover, the fact that Father, through his attorney, denied Indian ancestry as far as he knew on a form that was never filed does not relieve DPSS's of its duty to conduct ICWA inquiries with all readily ascertainable extended family members or the court of its duty to ensure that proper inquiry is made. (See *In re Y.W.* (2021) 70 Cal.App.5th 542, 554.) Thus, we conditionally affirm the legal guardianship order with a limited remand for DPSS and juvenile court to comply with ICWA and related California law.

IV.

DISPOSITION

The legal guardianship order as to B.F. is conditionally affirmed. The matter is remanded to the juvenile court with directions to ensure DPSS fully complies with the inquiry and, if necessary, notice provisions of ICWA and related California law, including interviewing any extended family members they may identify.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.